Supreme Court, U.S.
FILED
FEB 20 2001
OFFICE OF THE CLERK

(2)

No. 00-1167

In The

Supreme Court of the United States

TAHOE SIERRA PRESERVATION COUNCIL, Inc., A CALIFORNIA NON-PROFIT CORPORATION AND MEMBERSHIP ORGANIZATION, ET AL.

Petitioners,

v.

TAHOE REGIONAL PLANNING AGENCY, A SEPARATE LEGAL ENTITY CREATED PURSUANT TO BI-STATE COMPACT, et al.

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS AND JAMES NOLEN IN SUPPORT OF PETITIONER

CHRISTOPHER SENIOR
NATIONAL ASSOCIATION OF
HOME BUILDERS
1201 15TH STREET, NW
WASHINGTON, DC 20005
(202) 887-4626

*MARC B. KAPLIN, ESQUIRE
BARBARA ANISKO, ESQUIRE
Counsel of Record
KAPLIN STEWART MELOFF
REITER & STEIN, P.C.
SENTRY PKWY, BLDG 640
BLUE BELL, PA 19422
(610) 941-2666

Attorneys for Amici Curiae

10 pp

TABLE OF CONTENTS

Page(s)

SUMMARY OF ARGUMENT 1

INTEREST OF THE AMICI CURIAE 2

ARGUMENT 5

TABLE OF AUTHORITIES

Page(s)

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 4

Dolan v. City of Tigard, 512 U.S. 374 (1994) 4

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 4

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987) .....*passim*

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 1, 4

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 4

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 4

Pennel v. City of San Jose, 485 U.S. 1 (1988) 4

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) 4

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 4

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764 (9th Cir. 2000) .....*passim*

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)..... 4

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Amici curiae, James A. Nolen, III ("**Nolen**") and the National Association of Home Builders ("NAHB") have received the written consent of both the petitioner and the respondents to submit this *amicus curiae* brief.[1] The letters of consent are appended to this Brief.

Nolen and the NAHB submit this *amicus curiae* brief in support of Petitioner Tahoe-Sierra Preservation Council, Inc.'s Petition for Writ of Certiorari in the case of *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Commission* because this case raises a fundamental constitutional issue concerning the rights of private landowners to obtain just compensation when they are denied all use of their properties by governmental regulation.

Until the United States Court of Appeals for the Ninth Circuit's decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000) (the "**Tahoe-Sierra Decision**"), it was uniformly accepted that landowners are entitled to just compensation for temporary governmental regulations which have the effect of depriving landowners of all use and enjoyment of their land. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court made it clear that a regulation that deprives a landowner of all economically beneficial or productive use is a compensable taking. In *First English Evangelical*

---

[1]Pursuant to Rule 37.6 of this Court, amicus state that their counsel authored this brief and amicus paid for it. This brief was not written in whole or part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation.

Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), this Court made it clear that a temporary taking during a planning moratorium requires compensation the same as a permanent taking. The Ninth Circuit's Tahoe-Sierra Decision incomprehensibly and unjustifiably rejects this Court's holdings and casts doubt upon these well-settled principles of constitutional law. The Ninth Circuit's Tahoe-Sierra Decision represents dangerous precedent and cannot be permitted to stand.

INTERESTS OF THE AMICUS CURIAE

Amicus Curiae Nolen is a residential developer who has witnessed the deleterious effects of the Ninth Circuit's Tahoe-Sierra Decision, and already suffered harm as the result of it. Nolen owns 95 acres of undeveloped land in Newtown Township, Delaware County, Pennsylvania. On November 23, 1998, the governing body of Newtown Township adopted an ordinance which prohibited the submission of subdivision or land development plans for an initial period of eighteen months (the **"Moratorium Ordinance"**). The Moratorium Ordinance was later extended for an additional four months. The effect of the Moratorium Ordinance was to prevent Nolen from making any use of his undeveloped property for the entire twenty-two months that the Moratorium Ordinance was in effect.

In January, 1999, Nolen brought a proceeding in the Court of Common Pleas of Delaware County, Pennsylvania seeking just compensation for the temporary taking of his property as a result of the Moratorium

Ordinance[2]. On February 12, 1999, Newtown Township filed preliminary objections contending that no temporary taking had occurred. In a well-reasoned five page Opinion, on June 29, 2000, the Court of Common Pleas found that the Moratorium Ordinance temporarily deprived Nolen of all economically viable use of his property for the twenty-two months that it was in effect and that this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) required the payment of just compensation for his loss. Accordingly, the Court issued an Order denying the Township's preliminary objections and appointing a Board of View to determine the amount of just compensation to be awarded to Nolen.

However, approximately two weeks prior to the issuance of the Court's Order, the Ninth Circuit issued the Tahoe-Sierra Decision which directly contradicts this Court's holding in *First English*. After Newtown Township brought the Ninth Circuit's Tahoe-Sierra Decision to the Common Pleas Court's attention through the filing of a Motion for Reconsideration, on August 3, 2000, the Common Pleas Court vacated its June 29, 2000 Order denying the Township's preliminary objections and appointing a Board of View to determine the amount of just compensation to be awarded to Nolen. Therefore, the Ninth Circuit's Tahoe-Sierra Decision has already had the effect of reversing the clear mandate of *First English*.

---

[2] Under Pennsylvania law, just compensation for the de facto taking of private property is sought through the filing of a Petition for the Appointment of a Board of View. If the Court determines that a taking has occurred, a Board of View is appointed to determine the amount of just compensation to be awarded to the Petitioner.

The NAHB represents over 204,000 builder and associate members throughout the United States who, like Nolen, may be adversely affected by the Ninth Circuit's Tahoe-Sierra Decision. Its members include not only people and firms that construct and supply single family homes, but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.[3]

[3] The NAHB has appeared before this Court as an amicus curiae or as "of counsel" on behalf of the property owner in prior takings cases involving land use regulation. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Pennel v. City of San Jose*, 485 U.S. 1 (1988); *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *City of Monterey v. Del Monte Dunes at Montery*, 526 U.S. 687 (1999).

THE TAHOE-SIERRA DECISION HAS FAR-REACHING IMPLICATIONS

This case directly affects 449 landowners who, through a series of rolling moratoria/prohibitions on land development imposed by the Tahoe Regional Planning Agency, have been deprived of their rights to use their land since 1981. However, in addition to those 449 landowners, the Ninth Circuit's *Tahoe-Sierra* decision indirectly affects countless landowners throughout this country who have been, or may become subject to, governmental regulations which prevent them from making any use of their properties for a fixed or undefined period of time. By declaring that municipalities may prevent the use or development of private property for a temporary period of time without the requirement of payment of just compensation to landowners, the *Tahoe-Sierra* decision invites municipalities to summarily halt development within their borders for indefinite periods of time without specific provocation and without any financial responsibility to the landowners whose properties are forced to remain undeveloped and unused by such action. Given the anti-development sentiment that already exists in many areas of this country, the *Tahoe-Sierra* decision could single-handedly bring development to a standstill.

For these reasons, the NAHB and Nolen urge this Court to grant Petitioner's Petition for Writ of Certiorari and to reverse the Ninth Circuit's Tahoe-Sierra Decision.

DATED: February 20, 2001

Respectfully submitted,

*Marc B. Kaplin, Esquire
Barbara Anisko, Esquire
**Counsel of Record for Amici Curiae*
Kaplin Stewart Meloff Reiter & Stein, P.C

Christopher Senior
National Association of Home Builders